Indian Claims Commission

STANDING BUFFALO DAKOTA NATION

Report on: Flooding Claim
(Mediation)

104-04200/

Indian Claims Commission

Commission des revendications des Indiens

March 25, 2004

A/Chief Rodger Redman
Standing Buffalo Dakota Nation

The Honourable Andy Mitchell, PC, MP
Minister of Indian Affairs & Northern Development

The Honourable Irwin Cotler, PC, MP
Minister of Justice and Attorney General of Canada

RE: STANDING BUFFALO DAKOTA NATION'S FLOODING NEGOTIATIONS

The outstanding claim of the Standing Buffalo Dakota Nation for damages from the flooding of reserve lands was officially recognized by the federal government in December 1998, when it was accepted for negotiation.

The First Nation requested, and Canada concurred with the request, that the Commission ~~to~~ facilitate these negotiations. It was agreed that Ralph Brant, Director of Mediation, would act as the neutral facilitator. The hard work and goodwill of the parties led to a mediated settlement proposal. A final agreement was ratified by a vote of the First Nation membership on March 1, 2003.

Our brief summary of the history of this claim and review of the process of negotiations are contained in the attached report, which we are honoured to present to you on this date.

FOR THE INDIAN CLAIMS COMMISSION

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Chief Commissioner

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INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION OF THE STANDING BUFFALO DAKOTA NATION FLOODING NEGOTIATIONS

March 2004

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PART I

INTRODUCTION

The flooding claim of Standing Buffalo Dakota Nation, which dates back to the 1940s, was pursued under the Government of Canada's specific claims process for the better part of 17 years. This report examines how, with the assistance of the Indian Claims Commission (ICC), it was successfully resolved.

Standing Buffalo Dakota Nation, together with seven other members of the Qu'Appelle Valley Indian Development Authority (QVIDA), brought a claim to the Government of Canada for damages resulting from the recurrent and, in some cases, continuous flooding of reserve lands bordering the Qu'Appelle River. From west to east, QVIDA's membership includes Piapot, Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, Kahkewistahaw, and Ochapowace First Nations. Lands belonging to each of these bands were damaged by flooding caused by the construction in the 1940s of a number of water control structures throughout Saskatchewan's Qu'Appelle River Valley. The damage to what were productive farm lands as a result of years of flooding brought economic loss and hardship to the First Nations. Approximately 58 acres of Standing Buffalo Dakota Nation's lands in Indian Reserve (IR) 78 were adversely affected by this situation. In addition to its claim for losses related to IR 78, Standing Buffalo also claimed economic loss from flooding on IR 80B, hay lands that had been set aside for the use of area bands.

This report will not provide a full history of the Standing Buffalo Dakota Nation claim, but will summarize the events that led up to settlement of the claim and will illustrate the Commission's role in its resolution. The Commission's Director of Mediation, Ralph Brant, led the process. He was assisted by other Commission personnel as the table negotiated a final settlement of the claim.

In 1994, before the claim was accepted by the Government of Canada for negotiation, Standing Buffalo Dakota Nation, along with the other QVIDA First Nations, presented a request for inquiry to the Indian Claims Commission described as the "Qu'Appelle Valley Indian Development Authority Inquiry Flooding Claim" (the QVIDA claim). The Commission conducted planning conferences and then hearings in relation to the QVIDA claim.

On March 29, 1996, in the midst of the inquiry process, Jack Hughes of Specific Claims West, Department of Indian Affairs and Northern Development (DIAND), wrote to QVIDA coordinator Gordon Lerat advising that Canada was prepared to recommend acceptance of Standing

Buffalo's claim. Because research had confirmed that Canada had not issued a permit for the flooding, Canada was prepared to negotiate based on the Band's submission that there existed no authority for the flooding of Standing Buffalo's land. Several months later, however, Canada changed its position and informed Standing Buffalo that it was no longer willing to negotiate the First Nation's flooding claim. As a result, Standing Buffalo remained a party to the inquiry.

The Commission's inquiry process was completed and reported in February 1998. The Commission's recommendations follow:

RECOMMENDATIONS

Having found that the Government of Canada owes an outstanding lawful obligation to the First Nations of the Qu'Appelle Valley Indian Development Authority with respect to the Prairie Farm Rehabilitation Administration's acquisition of the right to use and occupy their reserve lands for flooding purposes, we therefore recommend:

RECOMMENDATION 1

That Canada immediately commence negotiations with the QVIDA First Nations to acquire by surrender or expropriation such interests in land as may be required for the ongoing operation of the control structures at Echo Lake, Crooked Lake, and Round Lake or, alternatively, remove the control structures.

RECOMMENDATION 2

That the flooding claims of the Sakimay, Cowessess, and Ochapowace First Nations be accepted for negotiation under Canada's Specific Claims Policy with respect to

(a) damages caused to reserve lands since the original construction of the dams in the early 1940s, and
(b) compensation for
    (i) the value of any interest that Canada may acquire in the reserve lands, and
    (ii) future damages to reserve lands,

subject to set-off of compensation of $3270 paid to those First Nations in 1943.

RECOMMENDATION 3

That the flooding claims of the Muscowpetung, Pasqua, and Standing Buffalo First Nations be accepted for negotiation under Canada's Specific Claims Policy with respect to

(a) damages caused to reserve lands
    (i) since the original construction of the dams in the early 1940s, or

(ii) alternatively, since 1977, if these First Nations can be bound by the 1977 Band Council Resolutions and if the release for damages prior to 1977 can be severed from the invalid part of the settlement, and

(b) compensation for

(i) the value of any interest that Canada may acquire in the reserve lands, and

(ii) future damages to reserve lands,

subject to set-off of compensation of $265,000 paid to those First Nations in 1977.[1]

Later that year, Canada accepted Standing Buffalo's claim for negotiation by letter from the Honourable Jane Stewart, then Minister of Indian Affairs and Northern Development, dated December 3, 1998. In her letter, Minister Stewart agreed with the Commission's recommendation that Canada negotiate the Standing Buffalo Dakota Nation's flooding claim "on the basis that Canada did not properly authorize the flooding of reserve lands."[2]

With this letter, the process of negotiating a settlement began. At the request of the First Nation and with the concurrence of Canada, the Commission agreed to act as facilitator to the negotiations.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative as a result of ongoing discussions between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. It was established by Order in Council on July 15, 1991, followed by the appointment of Harry S. LaForme as Chief Commissioner. The Commission became fully operative with the appointment of six Commissioners in July 1992.

The Commission's mandate is twofold: it has the authority (1) to conduct inquiries under the *Inquiries Act* into First Nation's specific land claims that have been rejected by Canada, and (2) to provide mediation services for claims in negotiation.

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[1] ICC, *Qu'Appelle Valley Indian Development Authority Inquiry Report on Flooding Claim* (Ottawa, 1998), reported (1998), 9 ICCP 159 at 369–70.

[2] Jane Stewart, Minister of Indian Affairs and Northern Development, to Chief Melvin Isnana, December 3, 1998 (ICC file 2107-45-1M).

Canada distinguishes most claims into one of two categories: comprehensive and specific. Comprehensive claims are generally based on unextinguished and aboriginal title and normally arise in areas of the country where no treaty exists between First Nations and the Crown. Specific claims generally involve a breach of treaty obligations or where the Crown's lawful obligations have been otherwise unfulfilled, such as a breach of an agreement or a dispute over obligations deriving from the *Indian Act*.

These latter claims are the focus of the Commission's work. Although the Commission has no power to accept or force acceptance of a claim rejected by Canada, it does have the power to thoroughly review the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and to subpoena evidence if necessary. If the inquiry concludes that the facts and the law support a finding that Canada owes an outstanding lawful obligation to the claimant, the Commission may recommend to the Minister of Indian Affairs and Northern Development that a claim be accepted.

In addition to conducting inquiries, the Commission is authorized to provide mediation services at the request of parties in negotiation. From its inception, the Commission has interpreted its mandate broadly and has vigorously sought to advance mediation as an alternative to the courts. In the interests of helping First Nations and Canada negotiate agreements that reconcile their competing interests in a fair, expeditious, and efficient manner, the Commission offers the parties a broad range of mediation services tailored to meet their particular goals.

PART II

A BRIEF HISTORY OF THE CLAIM

The historical context of this claim has been described at length in the February 1998 *Qu'Appelle Valley Indian Development Authority Inquiry Report* of the Commission.[3] A brief summary will suffice here. It is important to note that Standing Buffalo's claim was for economic loss resulting from flooding damage to its reserve IR 78, as well as to IR 80B, the latter used by the First Nation as a source of hay.

The bands forming QVIDA entered into Treaty 4, or the Qu'Appelle Treaty, in mid-September 1874. The lone exception was the Standing Buffalo Band, which descended from Minnesota Sioux Indians who came to Canada as refugees of the American Sioux War of 1862–63. As such, the band members were apparently excluded from Treaty 4, although they were later encouraged to settle within the Treaty 4 area, as long as the location they chose was not close to the American border.

Survey work on the area reserves began within a few years of the signing of Treaty 4. By 1884, all signing bands had been allocated their principal reserves within the Qu'Appelle Valley and the government's policy of promoting agricultural use of the reserves began. Crown officials actively encouraged the Standing Buffalo Band to settle on a reserve and to support itself through agriculture, indicating that they would assist it to this end. Dominion Land Surveyor John C. Nelson surveyed the Standing Buffalo lands along with the other reserves forming the Muscowpetung Agency of the Department of Indian Affairs in 1881–82. He obtained verbal instructions from the local Indian Agent and selected the lands in conjunction with the Agent and the Chiefs.

Standing Buffalo IR 78, surveyed in 1881, was located along the north side of Pasqua and Echo Lakes and the intervening reach of the Qu'Appelle River. Since the Band was not a signatory to Treaty 4, IR 78 contained only 7.6 square miles, or 4,864 acres – an allocation of only 80 acres per family of five rather than the one square mile (or 640 acres) stipulated by the treaty.

At that time, recognizing that Standing Buffalo would need additional resources, surveyor Nelson stated that, given the lack of hay on IR 78, a meadow would be set aside for the First

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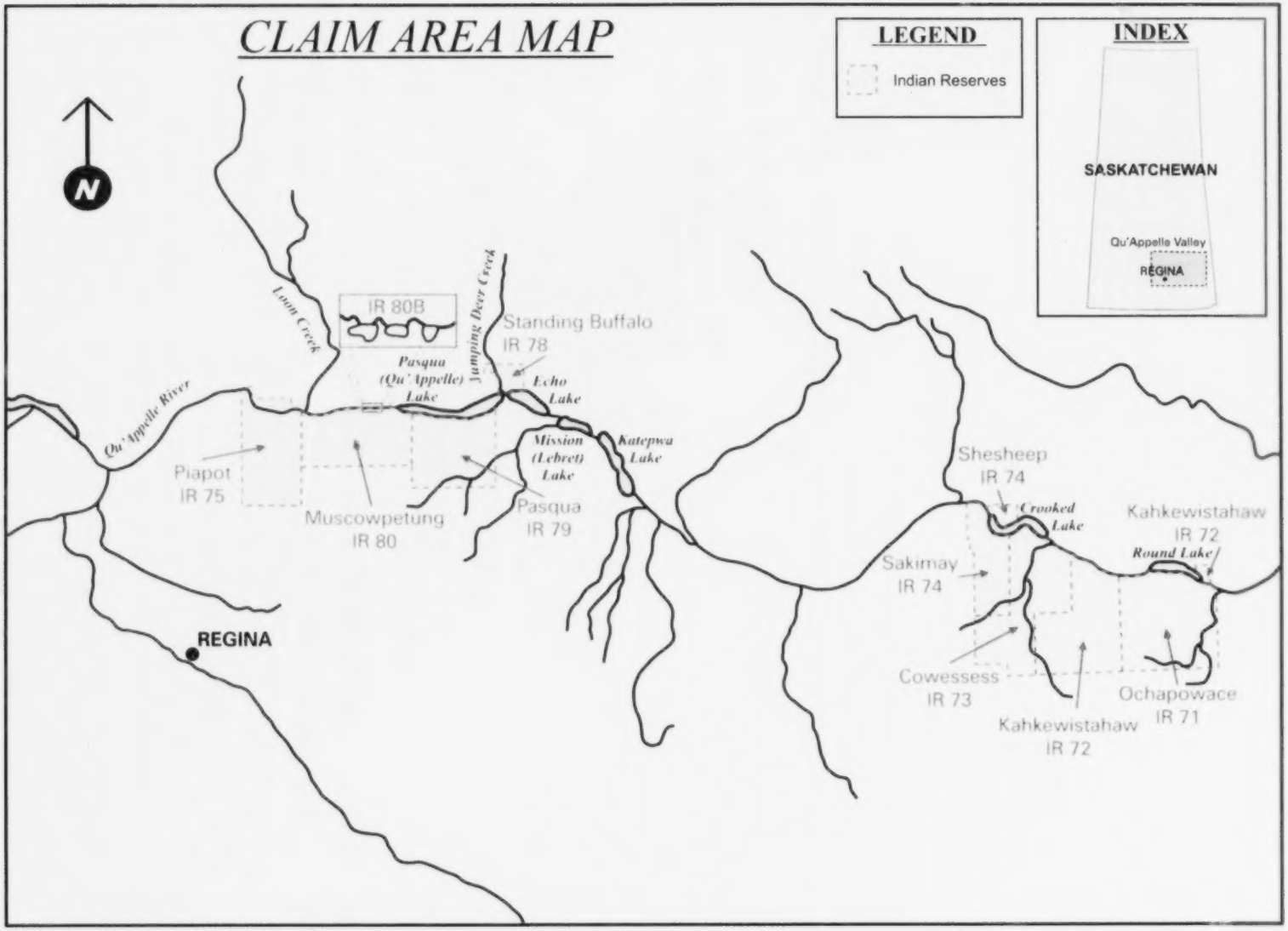
[3] Full documentation of the details summarized here is found in ICC, *Qu'Appelle Valley Indian Development Authority Inquiry Report on Flooding Claim* (Ottawa, 1998), reported (1998), 9 ICCP 159.


CLAIM AREA MAP
LEGEND
Indian Reserves
INDEX
SASKATCHEWAN
Qu'Appelle Valley
REGINA
N
Loon Creek
IR 80B
Jumping Deer Creek
Standing Buffalo
IR 78
Pasqua
(Qu'Appelle)
Lake
Echo
Lake
Qu'Appelle River
Mission
(Lebret)
Lake
Katepwa
Lake
Piapot
IR 75
Muscowpetung
IR 80
Pasqua
IR 79
Shesheep
IR 74
Crooked
Lake
Kahkewistahaw
IR 72
Round Lake
Sakimay
IR 74
REGINA
Cowessess
IR 73
Kahkewistahaw
IR 72
Ochapowace
IR 71

Nation's use in an extensive hay ground he had surveyed up the river. His correspondence indicated that he selected the hay ground on the north shore of the Qu'Appelle opposite Muscowpetung IR 80. The department considered formally adding the hay grounds to the Muscowpetung reserve but then rejected the plan, likely in response to Nelson's description of the purpose of the hay land. The hay grounds were, nevertheless, to be known as IR 80B.

In 1889, numerous reserves were confirmed by Order in Council including Standing Buffalo IR 78, Muscowpetung IR 80, and the Hay Reserve 80B. Muscowpetung IR 80 was on the south side of the Qu'Appelle River. Hay Reserve 80B, on the north side, was confirmed for the use of Muscowpetung "and others." Despite the contemporary claim of the Canadian Pacific Railway (CPR) to the odd-numbered sections in IR 80B, all the sections in the hay lands were confirmed as reserve land.

Upon the claim of the CPR being relinquished, IR 80B was transferred from the Department of the Interior to the Superintendent General of Indian Affairs by an Order in Council passed in December 1897 and amended in February 1899. The stated purpose was to add IR 80B to Muscowpetung IR 80. Despite this action, IR 80B continued to be listed in the Indian Land Registry as a separate reserve.

Standing Buffalo is known to have cut hay on IR 80B as well as at other off-reserve locations. Although much of the documentation regarding the use of IR 80B is not specific, precise statements made by a number of Indian Affairs officials over the years supported Standing Buffalo's use of and reliance on these hay lands. In 1903, Laird noted that members of Standing Buffalo cut hay on section 14 of IR 80B when they were first settled on their reserve; an Indian Agent wrote in 1897 that Standing Buffalo depended on hay cut at IR 80B; and in 1921 another Agent commented that Standing Buffalo had the major use of IR 80B. Other information indicated that the Band had a long and consistent history of obtaining hay in locations other than its own reserve, a major source being IR 80B.

Officials recognized that Standing Buffalo IR 78 was too small and lacked necessary resources, and over the years they made various attempts to secure additional lands. Although the Agent was specifically instructed in 1921 to reserve sections of IR 80B for the exclusive use of Standing Buffalo, no action was taken.

Some lands were eventually transferred to the Department of Indian Affairs and later added to the reserve. The additions are located west of Jumping Creek.[4]

[4] Standing Buffalo Flooding of 80B Issue, Final Draft Report, Joan Holmes & Associates Inc., September 19, 2001 (ICC file 2107-45-1M).

PART III

NEGOTIATION AND MEDIATION OF THE CLAIM

The Commission's role in settling a First Nation's claim often ends as soon as its inquiry is completed and the claim accepted for negotiation by Canada. In this case, however, both Canada and Standing Buffalo agreed that the Commission should participate in the negotiations as a neutral facilitator. With the Commission as chair, the first negotiation meeting was held in November 2000.

The job of facilitation focused almost entirely on matters relating to process. The Commission's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish mutually acceptable agendas, venues, and times for the meetings. At the request of the parties, the Commission was also responsible for mediating disputes, assisting the parties in arranging for further mediation, and acting as a coordinator for the various studies undertaken by the parties to support negotiations.

Although the Commission is not at liberty to disclose the discussions during the negotiations, it can be stated that Standing Buffalo Dakota Nation and representatives of the Department of Indian Affairs and Northern Development worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at a mutually acceptable resolution of the First Nation's claim.

Elements of the negotiation included a bilateral (Standing Buffalo and Canada) negotiation protocol and a trilateral (Standing Buffalo, Canada, and the Commission) mediation/facilitation protocol; quantification of the land damaged by flooding; the interest held by Standing Buffalo Dakota Nation in IR 80B (this part of the claim was subsequently abandoned by the First Nation); identification of damages and compensation criteria; valuation of economic losses; various research projects; alternatives to surrender; validity of the 1977 Band Council Resolutions; the costs of negotiation versus the amount of land at issue/reasonable compensation; and, finally, settlement issues and agreements, surveys, ratification, and communications.

In early 2002, Canada's negotiating team changed with the appointment of a new federal negotiator and legal counsel. After intense and elaborate negotiations, Canada made an offer to settle in July of that year. The First Nation counteroffered, and a tentative agreement was reached in late September. The Settlement Agreement was finalized shortly thereafter.

The Settlement Agreement provided $3.6 million in compensation to the Band and the ability to acquire up to 640 acres of agricultural land, which would be set apart as reserve land pursuant to Canada's Additions to Reserves Policy. A portion of the moneys received has been deposited into the Standing Buffalo Band capital trust account to allow for the purchase of specific assets. The balance of the money has been deposited into the Band's revenue trust account to be used to promote the general progress and welfare of the Band or any member of the Band. In pursuit of the latter objectives, a seven-person advisory board has been established to make recommendations regarding expenditures to the Chief and council.

On December 21, 2002, the First Nation held its first ratification vote, which failed. A second vote, held on March 1, 2003, was successful. Once the Settlement Agreement had been ratified by the First Nation, it was formally approved by Canada and signed by the Minister of Indian and Northern Affairs in March 2003.

PART IV

CONCLUSION

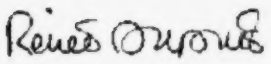
As has been the case with numerous other specific land claim negotiations, negotiating teams for Standing Buffalo Dakota Nation and the Government of Canada drew on the experience and expertise available to them by having the Indian Claims Commission participate in the negotiations as mediator/facilitator. The credit for settling this claim belongs to the parties. However, the Commission's mediation, in its role as a neutral third party, helped maintain the focus and momentum of the negotiations. As a result, the claim was settled in little more than two years after the negotiation process began.

If the Commission were to make one recommendation to tables beginning negotiations of this kind, it would be to encourage the parties to review carefully the requirement to undertake research and loss-of-use studies. Often parties to a new negotiation are not able to choose the appropriate study areas or to define the scope of the work to be undertaken within each study area. When studies are undertaken at too early a stage in the negotiation process, the end result can be unnecessary, overlapping, and expensive work. By taking their time at the start, negotiators have the opportunity to review the vast amount of work already done on claims that have been settled, claims that may involve similar amounts of land or similar geographical situations. This abundant information should be considered by the table in determining what further study needs to be done. The end result would almost certainly be a shorter overall negotiation process and an earlier settlement, at considerably less cost to the First Nation, Canada, and Canadian taxpayers.

Similarly, where the negotiating parties decide that research and loss-of-use studies are to be undertaken, they would be well advised to take advantage of the Commission's knowledge and experience in coordinating studies. In this role, the Commission assumes responsibility for overseeing the research/loss-of-use study process beginning with the development of the request for proposal packages (including the provision of generic models of, and assistance in developing, the terms of reference for each study); overseeing the proposal call and contract award process; providing ongoing study coordination throughout the study process; setting the required reporting requirements and deliverables and ensuring that they are fulfilled. The Commission is able to provide

this type of service in a most cost-effective way and can thus provide added value to the overall negotiating process.

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis
Chief Commissioner

Dated this 25th day of March, 2004.

Indian Claims Commission

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